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No. 944

IN THE

Supreme Court of the United States

October Term, 1944.

LESLIE BEN DRAKE, ET AL., *Petitioners,*

VERSUS

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND SUPPORTING BRIEF

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PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable The Supreme Court of the United States:

Come now Leslie Ben Drake and Gilbert Allen Sanderson, hereinafter called petitioners, and petitioning for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, respectfully show:

STATEMENT OF THE CASE

On the 26th day of January, 1944, an indictment was returned to the District Court of the United States, for the Northern District of Texas, charging petitioners, J. R. Clark and Floyd Edward Oldham, with having on or about January 12, 1944, entered into a conspiracy to violate what is commonly known as the War Explosives Act as defined and announced in Sections 121 to 141, Title 50, of the United States Code Annotated, and to have done certain overt acts in furtherance of said conspiracy.

On the 29th day of January, 1944, the case was called for trial and each of the defendants was convicted and sentenced to be confined in a United States penitentiary to be selected by the Attorney General for a term of two years.

Leslie Ben Drake and Gilbert Allen Sanderson seasonably appealed to the United States Circuit Court of Appeals for the Fifth Circuit, and the judgment of the lower court was affirmed by said Circuit Court of Appeals on December 9, 1944 (Tr. 39). They filed their petition for a rehearing (Tr. 43), which was on the 13th day of January, 1945, overruled without a written opinion.

QUESTION PRESENTED

Whether the Supreme Court of the United States will note and correct obvious and fundamental errors of such

a nature as might reflect upon the public representation of justice, materially affecting the rights of petitioners, where no exceptions or objections were made and had at the trial, and where they were not brought forth by proper assignments of error.

STATEMENT AS TO THE JURISDICTION

This case originated in the District Court of the United States, for the Northern District of Texas, at Dallas. Upon the conviction of petitioners and sentence of two years imposed upon each of them, they appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which said court affirmed the judgment and sentence of the lower court. They filed their petition for rehearing, which was overruled by said court.

Jurisdiction of this case is conferred upon the Supreme Court of the United States by Section 347-a, U. S. C. A., Title 28, and sanctioned by subsection 3 of paragraph 5 (b) of Rule 38, Court Rules of the Supreme Court of the United States.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The errors here assigned are obvious and fundamental, unquestionably affecting the rights of petitioners, and are of such nature as might likely reflect upon public justice, and the action of the United States Circuit Court

of Appeals for the Fifth Circuit in failing and refusing to take cognizance of such errors, not properly assigned, was in conflict with the rule of well established decisions of this Honorable Court, and particularly in conflict with:

Brookfield v. United States, 272 U. S. 448, 450, 71 Law Ed. 345;

N. Y. Cent. R. R. Co. Case, 279 U. S. 308-310, 73 Law Ed. 706;

United States v. Atkinson, 297 U. S. 157, 80 Law Ed. 555;

and the well established line of dicisions of the Circuit Courts of Appeals, and particularly in conflict with:

Benson v. United States, 112 F. (2) 422;

Genatos v. United States, 104 F. (2) 929;

Hayes v. United States, 112 F. (2) 676;

Meadows v. United States, 82 F. (2) 881;

Thomas v. D. C., 90 F. (2) 424.

WHEREFORE, your petitioners respectfully pray that writ of certiorari issue to the Honorable The United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify to this court for its review and determination on a day certain a full and complete transcript of the record and proceedings in the cause numbered

and entitled on its docket: No. 10950, Leslie Ben Drake, et al. v. United States of America, and that the judgment of the Circuit Court of Appeals and that of the trial court be reversed and the cause remanded, and for such other orders as may be by this Honorable Court deemed just and proper.

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No.———

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Supreme Court of the United States

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LESLIE BEN DRAKE, ET AL., *Petitioners,*

versus

UNITED STATES OF AMERICA, *Respondent*

SUPPORTING BRIEF

To the Honorable The Supreme Court of the United States:

In support of their petition for writ of certiorari, petitioners respectfully show to this Honorable Court:

1

OPINIONS OF THE COURT BELOW

There was no opinion by the trial court, but the opinion of the United States Circuit Court of Appeals for the Fifth Circuit was handed down on December 9, 1944 (Tr. 39), and the petition for rehearing was overruled without written opinion (Tr. 46).

JURISDICTION OF THE COURT

This court has jurisdiction of this cause under Title 28, U. S. C. A., Section 347-a, and under subsection 3 of paragraph 5 of Rule 38 of the Court Rules of the Supreme Court of the United States.

The jurisdiction of this court is invoked upon the following grounds: The errors hereinafter assigned are of such obvious nature calculated to reflect upon public justice and to materially affect the rights of the petitioners, that the United States Circuit Court of Appeals had no discretion other than to note and correct same, and in refusing to do so decided a point of law in conflict with the well established rule of decisions of this Honorable Court, and particularly in conflict with:

Brookfield v. United States, 272 U. S. 448, 450, 71 Law Ed. 345;

N. Y. Cent. R. R. Co. Case, 279 U. S. 308-310, 73 Law Ed. 706;

United States v. Atkinson, 297 U. S. 157, 80 Law Ed. 555;

Benson v. United States, 112 F. (2) 422;

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On the 29th day of January, 1944, the case was called for trial and each of the defendants was convicted and sentenced to be confined in a United States penitentiary to be selected by the Attorney General for a term of two years.

Leslie Ben Drake and Gilbert Allen Sanderson seasonably appealed to the United States Circuit Court of Appeals for the Fifth Circuit, and the judgment of the lower court was affirmed by said Circuit Court of Appeals on December 9, 1944 (Tr. 39). They filed their petition for a rehearing (Tr. 43), which was on the 13th day of January, 1945, overruled without a written opinion.

ASSIGNMENTS OF ERROR

1

Since this was a conspiracy case only, and the acts of one could be considered by the jury as the acts of all while

the conspiracy was in existence, it was error of such obvious nature as to challenge the notice and cause the correction of this Honorable Court, to have allowed the witness, Luther Wayne Maddox, to testify, in the presence and hearing of the jury, that on the night of January 12, 1944, he and his partner saw J. R. Clark, one of the petitioners, standing on the corner of Ervay and Bryan Streets, Dallas, Texas, near the Post Office, and they "thought there was something wrong with the way he was acting" (Tr. 6), for the reason that such testimony constituted the opinion and conclusion of the witness, was highly prejudicial, and was calculated to inflame the minds of the jury against petitioners.

2

It was obvious error, materially affecting the rights of petitioners, for the trial court to allow the witness, Luther Wayne Maddox, to testify that he knew that his (Leslie Ben Drake's) name was not J. C. Wilson, as he had told them he was, and that they "searched them at the jail office, but had first searched them here to see that they didn't have any firearms or knives," for the reason that this testimony was an insinuation that petitioner, Leslie Ben Drake, was a dangerous desperado, accustomed to carrying guns and knives, and was, therefore, prejudicial and calculated to inflame the minds of the jury against him (Tr. pp. 6-7).

3

It was obvious error, materially affecting the rights of petitioners, for the court to permit the witness, Luther Wayne Maddox, to testify that when they reached the jail they searched the car and found a kit of tools sitting on the floor of the car, and that "they looked like burglar's tools, being tools that would open any kind of a strong box, that they could be used in that particular line of work," for the reason that this was an opinion and conclusion of the witness, strongly calculated to lead the jury to believe they were thieves, burglars, and safe blowers, and was highly improper, inflammatory, and calculated to so prejudice the minds of the jury that no kind of rebuttal testimony would erase, and which could not be erased even by an instruction of the court not to regard it for any purpose, which was not done (Tr. p. 7).

4

It was obvious error, materially affecting the rights of petitioners, for the court to permit the witness, Ewing Jones, to testify "That on the occasion of the arrest of the defendants there were turned over to him the burglary tools and explosives" (Tr. p. 10), for the reason that whether or not they were burglary tools was an opinion and conclusion of the witness, was highly inflammatory, prejudicial, and calculated to so inflame the minds of the jury to such an extent that they could not give petitioners a fair trial under any circumstances.

5

It was obvious error for the court to permit the witness, Joe S. Baldwin, to testify that "the amount of dynamite he saw would tear counsel table he saw in the courtroom all to pieces and blow it all over the courtroom; that it was sufficient to open a safe or strongbox" (Tr. p. 11), for the reason that he had been called, evidently, as an expert to testify as to whether or not what petitioners had in their possession was such explosives as were denounced by the statute, and not to give an example or demonstration, and the testimony, evidently elicited by questions of government counsel, that it was sufficient "to open a safe or strongbox," was highly prejudicial, inflammatory and calculated to so prejudice the minds of the jury as to render it impossible for the jury to give them a fair and impartial trial.

6

It was obvious error for the court to permit the witness, H. L. Thompson, to testify that he was present when the examination was made of the explosives, and "the expert told him they were satisfied; that he was also satisfied by the demonstration from what he knows of explosives" (Tr. p. 11), for the reason that this was his own opinion and conclusion, hearsay, highly improper way to establish the fact they had explosives, if they did; that Thompson had not qualified as an expert, all of which was prejudicial, inflammatory, and highly calculated to inflame the

minds of the jury to such an extent as to render it impossible for them to give petitioners a fair trial.

7

It was obvious error, calculated to materially affect the rights of the petitioners, for the court to charge the jury, "* * * and you will not convict them by reason of the fact that they may have had burglary tools. You can't indict a man for one offense and convict him for another, and you will not consider the fact that they had burglary tools against them. That was permitted to come into the case to show the surrounding circumstances and attitude of the parties—you can consider it as throwing light upon their probable intention" (Tr. 19-20), for the reason that this charge amounts to a finding of the court that the defendants actually had burglary tools in their possession, and if they did, this fact was not a material issue in the case, all of which said charge amounted to a finding of the court that they had burglary tools and that if they did, this was a material issue in the case, whereas, in truth and in fact, it was immaterial and irrelevant, if they did so have such burglary tools, and further, was prejudicial, inflammatory and calculated to so inflame the minds of the jury against petitioners that it would be impossible for them to receive a fair and impartial trial at the hands of the jury.

8

It was obvious and fundamental error for the trial court to fail to charge the jury on circumstantial evidence (Tr. pp. 12-21).

QUESTION PRESENTED

Whether the Supreme Court of the United States will note and correct obvious and fundamental errors of such a nature as might reflect upon the public representation of justice, materially affecting the rights of petitioners, where no exceptions or objections were made and had at the trial, and where they were not brought forth by proper assignments of error.

BRIEF OF THE ARGUMENT

Counsel for petitioners are so firmly convinced that all eight of their assignments of error present such harmful and prejudicial matters; that the errors complained of are so fundamental and obvious; that no amount of instructions from the court to disregard things in them complained of could remove their harmful effects, that they deem it only necessary to brief the question of whether or not this Honorable Court will correct them in the present state of the record. Counsel are unable to conceive any kind or character of reason why they were not challenged by the counsel who tried the case, but we do believe that this Honorable Court will not let petitioners

go to the penitentiary simply because they did not have a counsel who could or would protect their rights. Further, we must suppose that all the testimony in the record concerning the possession of burglary tools by petitioners must have been elicited by questions of government counsel, and if so, we further urge that the harmful effects of this procedure and answers of witnesses could not have been removed, if objected to at the time of making, and the trial court had then and there instructed the jury not to consider it.

We further urge that the instructions given the jury, after the trial was over, and after the jury had had the benefit of the burglary tools testimony throughout the trial, to limit the testimony concerning them as the court did, only served to emphasize this highly prejudicial and improper testimony, for the court, in effect, charged the jury that petitioners did actually have burglary tools in their possession, and that it was an issue in the case to show motive and intent.

Petitioners, with others, were charged simply of having conspired to possess explosives when the United States was at war with Germany and Japan, without having first applied to the Director of the Bureau of Mines for a license to possess such explosives. We contend and believe, that under the law, it is quite immaterial for what purpose they possessed it. It is our theory of the law that had they possessed it for the purpose

of blasting rocks for a foundation to build a church, the law would have been violated had they not have had the license required. Such violation itself is a misdemeanor, punishable by a fine of not more than $5,000.00, or imprisonment of not more than one year, or both. (U. S. C. A., Title 50, Sec. 141.) The United States District Attorney saw fit to prosecute them under the charge of conspiracy with the higher bracket of punishment, although there was only one isolated transaction, which is a matter of his own policy and with which we are not concerned, except in so far as this case is concerned.

The only comprehensive description of what tools petitioners actually had, which was quite immaterial to any issue involved in the case, was given by the witness, Randolph Darnell. He testified (Tr. p. 9) that there was found in the car "several punches and a tool with a chisel on one end and a hammer on the other, two or three of these, a brace and a bit and a sledge hammer weighing approximately three pounds". These tools could have been used for any legitimate purpose. Even if the tools had any purpose at all in the case, and, as above stated, whether petitioners did or did not have them was highly irrelevant, and to repeatedly allow witnesses to call them "burglary tools" and to charge the jury to disregard the fact that the defendants "had burglary tools" could only serve to prejudice the minds of the jury against petitioners.

That, under circumstances which we have here, higher courts will take notice of and correct errors affecting the

rights of litigants without objections and exceptions having been taken or assigned as error is provided for by the rules of this Honorable Court, and established by the overwhelming weight of authorities of long and unbroken standing. Where there has been a conflict between justice and technicalities, justice has always won. We think we have that kind of a case.

United States vs. Atkinson, 297 U. S., 157, 80 L. Ed., 555;

New York Cent. Ry. Co. Case, 279 U. S. 308-310; 73 L. Ed. 706;

Brookfield vs. U. S., 272 U. S., 448, 450, 71 L. Ed. 345, 346;

Annotation of this Point, 14 L. Ed. 643;

Hayes vs. U. S., 112 F. (2) 676;

Benson vs. U. S., 112 F. (2) 422;

McAfee vs. U. S., 105 F. (2) 21;

Harmon vs. U. S., 99 F. (2) 933;

Meadows vs. U. S., 82 F. (2) 881;

Thomas vs. D. C., 90 F. (2) 424;

Genatos vs. U. S., 104 F. (2) 929.

The above cases hold, in effect, that especially in criminal cases, involving the life and liberty of defendants, where the error is obvious and calculated to seriously af-

fect the rights of litigants, it is not only the privilege but the duty of appellate courts to notice and correct such errors. We urge earnestly that we come within that rule.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue to the Honorable The United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify to this court for its review and determination on a day certain a full and complete transcript of the record and proceedings in the cause numbered and entitled on its docket: No. 10950, Leslie Ben Drake et al. v. United States of America, and that the judgment of the Circuit Court of Appeals and that of the trial court be reversed and the cause remanded, and for such other orders as may be by this Honorable Court deemed just and proper.

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